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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NICHOLAS M. MURPHY, Appellant.	2 CA-CR 2008-0425 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700723

Honorable James L. Conlogue, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Nicholas Murphy appeals his conviction and sentence for manslaughter. He argues his conviction should be reversed because a witness referred to

Murphy's invocation of his right to remain silent and because the trial court erroneously admitted character and other-act evidence. He also argues the admission of blood analysis test results without a foundation witness violated his confrontation rights. Regarding his sentence, Murphy asserts the state did not allege adequately that his offense was a dangerous one, and that insufficient evidence supported the second jury's determination it was. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Murphy's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). D. lived in a single-wide trailer on rented property in Cochise County with his girlfriend, M., and her daughter, A. Murphy, the grandson of D.'s neighbors, lived in a recreational vehicle on D.'s property. D. kept several weapons in his trailer, including a loaded twelve-gauge shotgun. Before 5:00 a.m. on October 19, 2007, D., M., and A. left the trailer, locking it behind them. Just after 8:00 a.m., Murphy came to his grandparents' home and told his grandmother "there's been a horrible accident, [J.] has been shot." Murphy's grandmother called 911.

¶3 When law enforcement officers arrived, they found Murphy sitting on a bench near the trailer. He told one of the officers, "we broke into the home. We were playing with a gun and it went off." J. was found dead in the trailer with a large gunshot wound under his left eye. D.'s twelve-gauge shotgun was lying underneath his left leg. The pump action on the shotgun was partially open and an empty shell casing was lying

next to it. A detective testified that "somebody had fired [the shotgun] and then cycled [the action]." A criminalist testified it was unlikely the gunshot wound J. suffered had been self-inflicted, and that the shot had been fired from a distance between two-and-a-half feet and ten feet from J.

¶4 The state charged Murphy by information with second-degree murder. After a four-day trial, the jury found him guilty of the lesser included offense of manslaughter. A second jury, after a one-day trial, found the offense was dangerous pursuant to A.R.S. § 13-604.[1] The trial court sentenced Murphy to a presumptive term of 10.5 years' imprisonment. This appeal followed.

Discussion

Invocation of Right to Remain Silent

¶5 Murphy first contends the trial court committed reversible error by permitting a witness to testify Murphy had invoked his right to remain silent. Because Murphy failed to object to the witness's testimony at trial, and raises this issue for the first time on appeal, we review this claim only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not

[1]Significant portions of the Arizona criminal sentencing code have been renumbered effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer to the version of § 13-604 in effect at the time Murphy committed the offense. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1.

possibly have received a fair trial.'" *Id*. ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 699 P.2d 980, 982 (1984). Such error must be "'clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶6 To obtain relief on appeal under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The prejudicial nature of the error is a fact-intensive inquiry, and thereby case specific. *Bible*, 175 Ariz. at 572, 858 P.2d at 1175; *see also Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. Notably, "[a] defendant's [right to] due process is violated when a witness introduces a statement at trial that the defendant asserted his right to remain silent," *State v. Gilfillan*, 196 Ariz. 396, ¶ 36, 998 P.2d 1069, 1079 (App. 2000), but the error may be harmless, depending on the prejudicial nature of such an improper comment. *See State v. Guerra*, 161 Ariz. 289, 297, 778 P.2d 1185, 1193 (1989); *see also State v. Palenkas*, 188 Ariz. 201, 212-13, 933 P.2d 1269, 1280-81 (App. 1996). "A comment [on a defendant's invocation of constitutional rights] does not constitute reversible error unless the prosecution draws the jury's attention to the defendant's exercise of the right to remain silent and uses it to infer guilt." *State v. Guerrero*, 173 Ariz. 169, 172, 840 P.2d 1034, 1037 (App. 1992). Harmless error cannot, by definition, constitute fundamental error. *See Bible*, 175 Ariz. at 572, 858 P.2d at 1175.

¶7 Because we find the prosecutor's improper questions and the witness's resulting comments here were harmless, we conclude Murphy cannot establish that fundamental, prejudicial error occurred. During direct examination, Cochise County Sheriff's Office detective Wendy Adney testified she had read Murphy the *Miranda*[2] warnings before interviewing him. She was then asked whether Murphy had indicated to Adney "that he understood those warnings," and "wished to speak to [her]." Adney responded, "He invoked his rights and wanted an attorney present prior to answering any questions." Murphy did not object to either the state's question or Adney's response, nor did he move to strike the response. Murphy concedes the state did not mention during closing arguments that Murphy had invoked his right to remain silent. At the sentencing trial, in which a second jury was empanelled to determine dangerousness, the state again asked Adney whether she had interviewed Murphy. She responded, "[Murphy] and his grandfather had invoked their right [to remain silent] and [to] the presence of an attorney prior to answering any questions." Murphy again failed to object to the question or the response. The state did not mention during the closing arguments in front of this second jury that Murphy had invoked his right to remain silent. Although we note the prosecutor should have known better than twice to broach a defendant's invocation of his *Miranda* rights, the state did not suggest expressly that the jury should infer Murphy's guilt from that evidence. And, any prejudicial effect was mitigated by the collective evidence Murphy willingly answered Lieutenant Genz's questions about the incident, reported the

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

incident to 911 operators, and declined to answer Adney's questions apparently on the advice of his grandfather. Thus, in the context of the case as a whole, the evidence did not support a reasonable jury inferring that Murphy had declined to speak with Adney to withhold incriminating facts. Accordingly, Murphy has failed to establish fundamental, prejudicial error. *See Guerrero*, 173 Ariz. at 172, 840 P.2d at 1037.

Admission of Laboratory Reports

¶8 Murphy next contends the trial court reversibly erred by admitting, pursuant to the parties' stipulation, laboratory reports showing intoxicants in J.'s blood. He alleges their admission violated his Sixth Amendment right to confrontation because no witness was available for cross-examination about the results. But, because Murphy consented to the admission of the reports, he is precluded by the invited error doctrine from challenging their admission on appeal. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001). This doctrine is designed "to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *Id.* ¶ 11, *quoting State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) (alterations in *Logan*). Accordingly, "we do not consider whether the alleged error is fundamental." *Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d at 565. By inviting the error of which he now complains, Murphy has waived the issue and we decline to discuss it further. *See id.*; *see also State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007) (concluding defendant invited evidentiary error when defense explicitly informed trial court he did not object to admission of evidence in question).

Character and Other-Act Evidence

¶9 Murphy next contends the trial court erred in permitting witnesses to testify about Murphy's character and prior conduct. Because Murphy failed to object to the witnesses' testimony, we again review this claim only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. As we previously noted, "[t]o prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20.

¶10 Here, A. testified that the night before the shooting she had seen Murphy and J. smoking marijuana. She also observed them with "pills," which Murphy told her were "very, very strong" such that "they could leave somebody in a very odd state of mind." A. did not see either Murphy or J. ingest the pills, although Murphy told her they probably would do so later. A.'s testimony suggesting Murphy may have been under the influence of narcotics at the time of the shooting supported the state's theory that Murphy had acted recklessly and with extreme indifference to human life. *See* A.R.S. § 13-1104(A)(3).

¶11 Rule 404(b), Ariz. R. Evid., provides that:

> [E]vidence of other crimes, wrongs, or acts are not admissible in order to prove the character of a person to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶12 This list of proper purposes for admitting this evidence is not exclusive. *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983). The "complete story"

exception to Rule 404(b) "holds that evidence of other criminal acts is admissible when so connected with the crime of which the defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *State v. Johnson*, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977). A.'s testimony falls squarely within this exception. Her testimony helped explain the circumstances surrounding commission of the crime and did not introduce evidence of "other crimes, wrongs, or acts" improperly within the meaning of Rule 404(b). Accordingly, Murphy has failed to show either error or prejudice.

¶13 Murphy also complains that the state presented improper character evidence. D. testified that he "tricked" Murphy into returning his house key because "[Murphy] had given us reason to not really trust him as fully as we had been." He did not specify, however, what Murphy had done to deserve this distrust. D. also testified he had established house rules with Murphy, and had barred his windows with dowels to prevent Murphy from entering his residence when D. was absent. He explained that "[he] knew that [Murphy] had a struggle, or a bout with drug addiction." D. "respected [Murphy's] privacy" but asked Murphy that "[i]f he wanted to participate in that kind of thing[to] please do it outside of the property."

¶14 Lay witnesses may testify to matters with which they have personal knowledge in the form of opinions or inferences. Ariz. R. Evid. 602, 701. Those opinions or inferences must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a

fact in issue." Ariz. R. Evid. 701. Except in limited circumstances not present here, witnesses may not testify to "[e]vidence of a person's character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion." Ariz. R. Evid. 404(a).

¶15 D.'s testimony about the actions he took to retrieve his house key and to prevent Murphy from entering his home were matters about which he had personal knowledge. Contrary to Murphy's suggestion, D. did not render any opinion testimony that Murphy was untrustworthy. Rather, D. testified that he personally distrusted Murphy, but did not explain the circumstances surrounding that distrust. This testimony, therefore, was entirely proper. It is unclear from the record, however, whether D. had personal knowledge about Murphy's alleged bout with drug addiction, even though D. testified he "knew" about Murphy's struggle. Even assuming D. lacked personal knowledge, his testimony did not run afoul of Rule 404(a) because the evidence was not presented to prove Murphy's character and show action in conformity therewith. Rather, D.'s testimony was presented to explain further his own actions, and was "helpful to a clear understanding of [D.'s] testimony." Ariz. R. Evid. 701. To the extent D.'s testimony suggested Murphy had committed another crime, wrong, or act, it was not presented to prove character and action in conformity therewith in violation of Rule 404(b). Accordingly, Murphy has not demonstrated error, fundamental or otherwise.

Jury Determination of Dangerousness

¶16 After the jury found Murphy guilty of manslaughter, the state requested a jury trial to determine whether the manslaughter was a dangerous offense pursuant to § 13-604. Over Murphy's objection, the trial court then impaneled a second jury to make that determination. After a one-day trial, the second jury found Murphy's manslaughter conviction "involve[d] the discharge, use or threatening exhibition of a deadly weapon by [Murphy]." The court then sentenced Murphy pursuant to § 13-604(I). Murphy argues that, by "allowing the first jury to be excused," the state "waive[d]" the dangerousness allegation. But Murphy cites no authority in support of this proposition and does not develop his argument in any meaningful way. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain legal arguments with supporting authority). Accordingly, we do not address it. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop argument results in waiver).

¶17 Murphy additionally contends the state did not allege in the information that his offense was a dangerous offense as defined by § 13-604, and the trial court therefore erred in enhancing his sentence pursuant to the jury's finding. Murphy acknowledges the information included § 13-604 in the list of statutes Murphy was alleged to have violated. He argues, however, that mere citation to § 13-604, without specifically alleging the crime had been "committed with a deadly weapon or dangerous instrument," did not give him proper notice. Thus, he reasons, the court "was without

jurisdiction" to impanel a second jury to consider that question and, based on that jury's determination, impose an enhanced sentence.

¶18 Murphy concedes our supreme court has previously determined "that an allegation of dangerousness in a grand jury indictment, such as the citation to § 13-604 in the indictment[3] here, is sufficient to invoke § 13-604's sentence enhancement provisions." *State v. Burge*, 167 Ariz. 25, 28, 804 P.2d 754, 757 (1990). He asserts, however, that *Burge* "should be reconsidered." We lack the authority to do so, *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993), and therefore do not address this argument further.

Directed Verdict: Dangerousness Allegation

¶19 Murphy next asserts there was insufficient evidence to support the jury's finding that his manslaughter conviction was a dangerous offense under § 13-604(I) because it "involve[d] discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." "We review the sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). "Substantial evidence" is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). When considering a defendant's challenge to the sufficiency of the evidence, "we construe the

[3]Although an indictment was used as the charging document in *Burge*, Murphy was charged by information. *See* Ariz. Const. art. II, § 30. Murphy does not suggest, however, that *Burge* is inapplicable for this reason.

evidence in the light most favorable to sustaining the verdict[]." *State v. Jensen*, 217 Ariz. 345, ¶ 5, 173 P.3d 1046, 1049 (App. 2008).

¶20 Based on the evidence presented during the sentencing phase of the trial, the second jury plainly could have concluded J. had been killed by a gunshot fired from the shotgun found lying partially under his body. But, as Murphy correctly notes, there was scant evidence presented to the second jury that he was the one who caused the shotgun to be fired or that he otherwise had used or exhibited it. The only evidence presented suggesting Murphy had handled the shotgun at all was his admission to a law enforcement officer that he and J. had broken into the trailer, "were playing with the gun, and it went off."

¶21 But we need not decide if that statement, standing alone, was sufficient evidence for the jury to conclude Murphy had used, discharged, or exhibited the shotgun. The trial court instructed the jury that Murphy previously had been convicted of manslaughter, and that to obtain the conviction the state had needed to prove that offense "involved the discharge, use[,] or threatening exhibition of a deadly weapon by [Murphy]."[4] Additionally, the jury was instructed on the elements of manslaughter, including that, in order to be found guilty of manslaughter, Murphy had to have caused J.'s death. Because the sentencing jury was instructed Murphy had caused J.'s death, it

[4]To the extent Murphy suggests this jury instruction was unclear, he invited any error by requesting the instruction below. *See Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d at 565-66.

reasonably could find, based on the evidence presented, that J. had been killed with the shotgun, and that Murphy had discharged the shotgun that caused J.'s death.

Disposition

¶22 We affirm Murphy's conviction and sentence for manslaughter.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge